26 May 2001

Mr Stephen Ip
Secretary for Financial Services
Financial Services Bureau
18/F Tower 1 Admiralty Centre
Queensway
Hong Kong

Dear Mr Ip,

Re: Securities and Futures Bill

I have pleasure enclosing in this letter, our submission on the remaining Parts of the Bill. Since our first submission, entitled "an Overview", made on 29 January 2001, I think this is the last of the series. These submissions, as they stand, still represent the views of the Association.

As the Bill progressed in the Chamber of the Bills Committee, we have had the pleasure of meeting you and your colleagues on several occasions in exchanging views and friendly discussions, and we are most grateful for having the privilege.

We think now is an appropriate juncture for us to pause and take stock of our position and in particular to receive for the first time, if we may, your response to our completed submissions. As soon as we are in receipt of it, we shall immediately proceed to consider all matters arising.

May I wish you a happy week-end.

Yours sincerely

Paul Fan

Chairman

cc: LegCo Bill Committee

26 May 2001

Mr Andrew Sheng
Chairman
Securities & Futures Commission
12/F Edinburgh Tower
15 Queen's Road C
Hong Kong

Dear Andrew,

Re: Securities and Futures Bill

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Paul Fan
Chairman

cc: LegCo Bill Committee

SECURITIES AND FUTURES BILL

(Published for general information in November 2000)

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5th Submission on the Blue Bill

by

Hong Kong Stockbrokers Association

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(Part XIV to Part XVI)

dated

26 May 2001

Part XIV

Section 280 is a repetition of section 240 in Part XIII. For the purposes of insider dealing offence, it deals with the receiving of information in relation to a corporation by public officers and in subsection (2) it includes exchange participants and their officers and employees.

Exchange participants and their staff are people working in the private sector and as such there is a list of other professionals whose daily business are connected with the activities of corporations such as bankers, accountants, financial advisers etc. It is not understood why exchange participants, out of these professionals of the private sector, are specially considered to be in a position equivalent to a public officer in a public capacity.

The existing law does not put exchange participants in such a capacity and one wonders why they should now be included. It is also noted that this provision applies to all corporations as a whole and not restricted to listed corporations.

Section 290 prohibits the disclosure or circulation of information which is false or misleading and which may induce another person to subscribe for securities or deal in futures contracts in Hong Kong. Subsection (1) (c) (ii) however, provides that "the person knows that, or is reckless or negligent as to whether the information is false or misleading as to a material fact.."

We consider that culpability should go to a person who commits this offence with intention or recklessness and not to a person who is merely negligent as to a fact. When a person is negligent he has no criminal intent and it is this lack of "mens rea"
in a criminal offence with severe punishments, which is particularly worrying. In contrast, if we look at the existing law, section 138 of the Securities Ordinance, there is no element of negligence. Subsection (a) therein states: "any statement which is, at the time and in the light of the circumstances in which it is made, false or misleading with respect to any material fact and which he knows or has reasonable ground to believe to be false or misleading;"

Under that section 138, the person shall not make such statements "for the purposes of inducing .." and the element of mens rea is definitely present. Whereas in the proposed section under discussion, the test is lowered to "disclosure, circulation or dissemination of, information, that is likely—to induce ..". If the test is "likely to induce", it lies in the action of disclosure itself and not in the state of mind of the accused, nor on the fact that anybody has in fact been induced. We suggest that it should be reverted back to the existing criterion of "for the purposes of inducing..".

Section 291 deals with the situation of stock market manipulation which appeared under section 269 in Part XIII. Comments mentioned therein are equally applicable here. There seems to be a similar discrepancy in the Chinese version of the text. In subsection 291 (1)(a) the English version is "2 or more transactions..", whereas in the Chinese version it is: " more than 2 transactions.."

Section 293 in respect of foreign exchange contract is a mirror image of section 290 on securities and futures contracts. The element of negligence poses the same problem and our comments under section 290 are equally applicable here.

Part XV

Section 320 empowers a listed corporation to carry out an investigation into any interest in its shares, short position in shares and shares related to equity derivatives. A person whom the notification has been addressed to shall be obliged to comply to supply information required for the past 3 years within a time specified by the notice. Any failure is a criminal offence punishable by a fine and imprisonment for 2 years [section 325(4)]. Firstly we suggest that a listed corporation is not a regulatory body and failure to comply with its requests should never be a criminal offence. Secondly, a person complying with such a notice is put to expenses to supply the information required without reimbursement. This is an unfair situation. If one requires any information regarding the shareholding of a listed corporation as contained in its register of members, one has to pay for charges in obtaining such information.

Part XVI

Section 366 provides for the preservation of secrecy for the performance of functions under the provisions. Sub-paragraph (15)(c) (iii) includes " a person assisting any other person in the performance of any function under or in carrying into effect any of the relevant provisions." It is not clear who shall fall within this category of "person assisting". Does it include for example the person described under section 176 (1)(d), he who should "give to the investigator all assistance in connection with the investigation..", or under section 350 (2)(c), he who is required to "give him all assistance in connection with the investigation which that person is reasonably able to give,"? If the answer is in the affirmative, then we shall have a situation where a person has been investigated and having obligingly assisted in the investigation, he shall not be able to talk about it at all to any person.

Section 371 provides for false or misleading representations made to the Commission in support of any application, whether in writing, orally or otherwise. Under subsection (3), a representation is defined to mean a representation or statement:

"(a) of a matter of fact, either present or past;
(b) about a future event; or
(c) about an existing intention, opinion, belief, knowledge or other state of mind."

Subsection (2) makes it a criminal offence punishable by a fine of $1 million and imprisonment for 2 years.

We suggest that misrepresentation can only be determined by facts existing at the time of the representation. The future is more often than not, uncertain and it is common sense that no one can represent or predict the future. We cannot imagine how this can become a criminal offence. It would be very dangerously draconian if an oral statement on an opinion, on a belief, or on a certain state of mind can by itself become a criminal offence.

Section 375 provides for the standard of proof that is required for a court or the Commission to establish for matters other than criminal. However, it is noted that paragraph (a)(i) mentions "any provision of any Ordinance". Paragraph (d) mentions: "a person has been concerned in, or a party to, anything which results in the occurrence of any of the matters referred to in paragraph (a) or (b);"

One wonders why this Ordinance should provide for standard of proof regarding contravention of any provision of any Ordinance under paragraph (a).
The expression "a person has been concerned in, or a party to" is capable of any sort of interpretation that it is indefinite, uncertain and equivocal. People described under paragraph (c) or (e) are easily understood as to their legal meaning. The concepts of assisting, counseling, attempting and conspiring are legally well established. Whereas "a person concerned in" does not go any way in delineating the relationship or responsibility between one person to another. We suggest paragraph (d) be deleted.

Section 378

The Chinese text of the word "recklessness" appearing on the 4th line of subsection (1) seems to be expanded into two expressions, namely "reckless as to existing facts" or "reckless as to consequence". If the Chinese text is the intended interpretation, we suggest that this be reflected in the English version. If it is not, then we suggest the Chinese version to be reconciled.

Section 384 empowers the Commission to make rules. We have argued strongly against the Commission's power to make rules that carry criminal offence with or without strict liabilities in our previous submissions on both the White Bill and the present Blue Bill dated 30 June 2000 and 26 February 2001 respectively. We do not wish to repeat again except to add that we endorse entirely the view of the Law Society that "In the interests of certainty and justice, any other matters which are intended to attract criminal penalties should be set out in the Bill itself".

Provisions in the section require intermediaries to make returns at specified times to the Commission and provide for particulars to be contained etc. We are concerned that the Commission has too extensive powers ranging from repeated requests for same or similar information from different divisions of the Commission to unnecessary and sometimes intrusive questionnaires issued by different divisions. These measures pose considerable compliance costs to the industry. We suggest a provision need to be introduced that measures taken under rules by the Commission (whether they are requests, questionnaires or guidelines) would require a cost benefit analysis that the proposed measures will not impose additional compliance cost on the industry.

The precedent of the UK legislation on this point will throw some light on this particular situation. Section 65 of the Financial Services and Markets Act, 2000 provides:

"(1) Before issuing a statement or code under section 64, the Authority must publish a draft of it in the way appearing to the Authority to be best calculated to bring it to the attention of the public.

(2) The draft must be accompanied by –

(a) a cost benefit analysis; and

(b) a notice that representations about the proposal may be made to the Authority within a specified time."